

The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CLYDE RAY SPENCER, MATTHEW
RAY SPENCER, and KATHRYN E. TETZ,

Plaintiffs,

v.

FORMER DEPUTY PROSECUTING
ATTORNEY FOR CLARK COUNTY, JAMES
M. PETERS, DETECTIVE SHARON KRAUSE,
SERGEANT MICHAEL DAVIDSON, CLARK
COUNTY PROSECUTOR'S OFFICE, CLARK
COUNTY SHERIFF'S OFFICE, THE COUNTY
OF CLARK and JOHN DOES ONE THROUGH
TEN,

Defendant.

No. C11-5424BHS

PLAINTIFFS' REQUEST FOR
CONTINUANCE UNDER FED. R.
CIV. 56(d) BEFORE
RESPONDING TO DEFENDANT
MICHAEL DAVIDSON AND
SHIRLEY SPENCER'S MOTION
FOR SUMMARY JUDGMENT

NOW COME Plaintiffs, CLYDE RAY SPECER, et. al., by and through their attorneys,
Kathleen T. Zellner & Associates, P.C., and for their Motion for Relief Under Federal Rule of
Civil Procedure 56(d), states as follows:

Procedural History

1. Plaintiffs have filed a thirteen-count, sixty-eight page complaint against
Defendants. Counts 1 through 7 assert claims under 42 U.S.C. §1983 for violations of Mr.
Spencer's various constitutional rights. Counts 8 through 11 assert state claims against

1 Defendants related to the preceding counts brought under §1983. Counts 12 and 13 assert
 2 claims for Matthew R. Spencer and Kathryn E. Tetz's loss of consortium.

3 2. Plaintiffs' complaint is based on the Defendants' collaborative effort to frame
 4 Mr. Spencer for various acts of sexual abuse. In doing so the Defendants acted without
 5 probable cause, fabricated evidence, and withheld exculpatory evidence that would have
 6 established Mr. Spencer's innocence. The Defendants' wrongful conduct dates back to 1984,
 7 the date that the Defendants embarked on their conspiracy to falsely accuse Mr. Spencer.

8 3. Defendants Krause, Davidson, Clark County Prosecutor's Office, Clark County
 9 Sheriff's Office and Clark County served their initial disclosures on September 29, 2011. By
 10 stipulated order this Court extended the time for Defendant Peters to file his initial disclosures
 11 until November 15, 2011. Defendant Peters filed his initial disclosures on November 14, 2011.

12 4. On December 1, 2011, the parties submitted an Amended Proposed Joint Status
 13 Report and Discovery Plan ("the Plan"). In the Plan, the Defendants indicated that discovery
 14 must begin before settlement can be properly explored. In the Plan the parties also agreed that
 15 discovery would be needed on both liability and damages, and that discovery should not be
 16 limited or focused on any particular issues. The parties proposed that discovery could be
 17 concluded within sixteen months (April 1, 2013) of filing the report. *See Amended Joint Status*
 18 *Report and Discovery Plan, Docket No. 47, ¶¶5-6.*

19 5. On December 28, 2011, this Court entered a minute order, directing discovery to
 20 be completed by December 17, 2012.

21 6. Plaintiffs have been diligent in reviewing and obtaining discovery. Plaintiffs'
 22 counsel is in the process of reviewing Defendants' initial disclosures, which consists of
 23 thousands of pages of documents spanning more than 25 years of investigation and court

1 proceedings. *Zellner Affidavit*, ¶ 17. Simultaneous with the filing of this motion, Plaintiffs are
 2 serving Interrogatories on the various Defendants in anticipation of taking their depositions.

3 7. On May 23, 2012, Defendant Michael Davidson filed a motion for summary
 4 judgment seeking dismissal of all claims against him with prejudice pursuant to Federal Rules
 5 of Civil Procedure 56. Defendant Davidson's motion is in addition to the motions for summary
 6 judgment filed by the other Defendants on May 23 and May 24, 2012. Defendant Shirley
 7 Spencer filed a motion to join in Defendant Davidson's motion on May 25, 2012.

8 8. A review of Defendant Davidson's motion and the attached declarations reveals
 9 that additional discovery will be needed to properly respond to the motion. Therefore, pursuant
 10 to Federal Rules of Civil Procedure 56(d), Plaintiffs seek an order from this Court denying
 11 Defendant Davidson's and Defendant Shirley Spencer's motions without prejudice so that
 12 Plaintiffs can engage in discovery prior to responding to the dispositive motion.

13 *Applicable Law*

14 9. Federal Rule of Civil Procedure 56(d) provides:

15 Once a motion for summary judgment is filed, the non-
 16 moving party must show to the court that a genuine and
 17 material factual dispute exists to defeat summary judgment.
 18 If the non-moving party is still conducting valuable
 19 discovery or for some other reason is not yet ready or able
 20 to make that showing, the party may file an affidavit or
 21 declaration explaining why a ruling on summary judgment
 22 should be postponed. The court, in its discretion, may then
 23 grant a temporary reprieve if the reasons offered are
 persuasive.

10. Rule 56(d) provides a device for litigants to avoid summary judgment when the
 nonmovant needs to discover affirmative evidence necessary to oppose the motion. *Garrett v.*
San Francisco, 818 F.2d 1515, 1518 (9th Cir. 1987).

1 11. A request for relief pursuant to Rule 56(d) should be granted where the
2 requesting party specifies facts that further discovery would reveal, and explains why those
3 facts would preclude summary judgment. *Tatum v. City and County of San Francisco*, 441
4 F.3d 1090, 1100 (9th Cir. 2006).

5 12. The Ninth Circuit has further held that district courts should grant any Rule
6 56(d) motion “fairly freely” when a party moves for summary judgment before the opposing
7 party has had a realistic opportunity to pursue discovery relating to its theory of the case.
8 *Burlington N. & Santa Fe Co. v. The Assiniboine*, 323 F.3d 767, 774 (9th Cir. 2003). Indeed,
9 Rule 56(d) requires, rather than merely permits, discovery where the nonmoving party has not
10 had the opportunity to discover information that is essential to its opposition. *Metabolife*
11 *Inern., Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001), citing *Anderson v. Liberty Lobby,*
12 *Inc.*, 477 U.S. 242, 250 (1986).

13 13. Defendant Davidson’s motion for summary judgment is based in large measure
14 on the self-serving affidavits and exhibits attached to the other pending motions for summary
15 judgment, many of which contain purported “facts” which Plaintiffs dispute. Due to the
16 matters raised in the declarations and exhibits, Plaintiffs seek to depose all Defendants prior to
17 responding to Defendant Davidson’s dispositive motion.

18 ***Plaintiffs should be given an opportunity to depose Defendants Davidson and***
19 ***Shirley Spencer to determine the nature of their relationship and when it***
 started

20 14. Plaintiffs seek discovery related to Defendant Davidson and Defendant Shirley
21 Spencer’s romantic relationship, and the effect it had on the investigation of Mr. Spencer’s
22 criminal case.
23

1 15. Though it is not referenced in Defendant Davidson's motion, Plaintiff has
 2 alleged that the criminal investigation against him was motivated in part by the inappropriate
 3 relationship between Defendant Davidson and Defendant Shirley Spencer. Davidson separated
 4 from his wife and later moved into the home owned by Mr. Spencer and Shirley Spencer. The
 5 home was then sold, and the proceeds divided between Davidson and Shirley Spencer.

6 16. Plaintiffs have alleged that the romantic relationship between Davidson and
 7 Shirley Spencer started during the investigation of Mr. Spencer, and that the relationship
 8 motivated Davidson to take part in the fabrication of evidence and conspiracy to frame Mr.
 9 Spencer.

10 17. The findings from the Supreme Court of Washington and the Commutation of
 11 Mr. Spencer hold that this relationship began *during* the investigation of Mr. Spencer:

12 In December 1984 a deputy prosecutor conducted a videotaped interview
 13 of K.S., assisted by Ms. Krause and K.S.'s mother, but the tape was not
 14 disclosed until October 2009. Notwithstanding Ms. Roe's assessment, the
 15 State charged Mr. Spencer in January 1985 with first degree statutory rape
 16 and indecent liberties committed against K.S. *Meanwhile, Mr. Spencer's*
then current wife, Shirley Spencer, entered into a sexual relationship with
the lead detective [Defendant Davidson] investigating the case. That
 detective supervised Ms. Krause, whom he notified of the relationship.
 (Emphasis added). *Zellner Affidavit*, at Ex. 1, p. 2

17 18. Defendant Krause has acknowledged that Defendant Davidson deemed his
 18 relationship with Shirley Spencer significant enough that he informed her of it. *Zellner*
 19 *Affidavit*, at Ex. 2, p. 41. Certainly the motives of law enforcement to carry out the
 20 investigation against Mr. Spencer are relevant and material to his pending claims, and
 21 discovery on this issue prior to responding to dispositive motions should be permitted.

22 ***Plaintiffs should be given an opportunity to depose Defendant Davidson regarding***
 23 ***the extent of his involvement in the investigation and his supervision of Defendant***
Krause

20. Plaintiffs have alleged that Defendants Davidson, Krause and Peters, alone and in conspiracy, fabricated evidence against Mr. Spencer and concealed exculpatory evidence.

21. Defendant Davidson supervised Defendant Krause in the Spencer investigation, and, along with Defendant Krause, knew that the allegations against Mr. Spencer were untrue.

22. Through the course of her investigation, Defendant Krause generated police reports containing allegations of penile penetration against Mr. Spencer as to both Kathryn Spencer and Matthew Hanson.

23. For example, in her report detailing allegations of abuse by Kathryn Spencer, Defendant Krause documents:

“I asked her [Kathryn] what happened then and Katie stated, “Well, he [Mr. Spencer] hurt me.” I asked her if she could do that with the dolls and Katie at that time picked up the child female doll and inserted the penis of the male doll into the vaginal opening of the child female doll that she had indicated was her.” *Zellner Affidavit*, at Ex. 9, p. 7 (*Krause interview of Kathryn Spencer 10/18/84*).

24. Defendant Krause also documented abuse against Kathryn Spencer allegedly seen by Matthew Hanson during her interview with him:

“I asked Matt if he could show me what happened to Kathryn and at that time he picked up the female doll and I observed him carefully placing the penis of the male doll in the vaginal opening of the female doll and at that time Matt stated, “You have to put this all the way in and that’s what he did to Kathryn.” I asked Matt if anything else happened to Kathryn and Matt turned the female doll over and placed the penis on the buttocks of the female doll and stated, “And his pee-pee was like this in her bottom and that hurts her too, and she cries just like me when it hurts.” *Zellner Affidavit*, at Ex. 10, p. 20 (*Krause interview of Matthew Hanson 2/28/85*).

25. On August 30, 1984 Kathryn Spencer underwent a medical examination by Dr. Magee at the University of California Davis Medical Center to determine if any evidence existed suggesting she had been molested.

1 26. The examination was critically important to ascertaining the truth, as Kathryn
2 allegedly reported that Mr. Spencer had attempted to vaginally penetrate her. There was no
3 physical evidence obtained from the examination that was consistent with Kathryn having been
4 molested; there were no lacerations, bruises, redness, swelling or scars. The report was
5 therefore exculpatory as to Mr. Spencer. *Zellner Affidavit*, at Ex. 5 (*Dr. Magee Report*).

6 27. However, the report was never disclosed to counsel for the defense. Defendant
7 Peters has denied that the report was in the prosecutor's file. *Zellner Affidavit*, at Ex. 4, p. 332-
8 333 (*Peters Habeas Testimony*).

9 28. Similarly, a medical examination of Matthew Hanson was performed on March
10 6, 1985 to determine if there were any injuries consistent with sexual abuse. The report was
11 again critically important, as Defendant Krause had documented reports of severe penetration:

12 "[A]t that time Matt stated to me, "And he hurt my bottom, too." I asked
13 Matt who hurt is [sic] bottom and he stated, "My dad, Ray Spencer. He
14 puts his finger in my hole."... "He puts his pee-pee in my bottom and that
15 really hurts and that makes me really cry."... "Well, he touched my pee-
16 pee in the bathroom and then he put his pee-pee in my bottom." *Zellner*
17 *Affidavit*, at Ex. 10, p. 18 (*Krause interview of Matthew Hanson 2/28/85*).

18 29. The examination of Matthew Hanson demonstrated no evidence of physical
19 injury corroborating the charges of sexual assault against Mr. Spencer, including no lacerations,
20 bruises, redness, swelling or scars. The report was exculpatory to Mr. Spencer. *Zellner*
21 *Affidavit*, at Ex. 7 (*Dr. Galaviz Report*).

22 30. Like the report of examination of Kathryn Spencer, the report of examination of
23 Matthew Hanson was not disclosed to Mr. Spencer. As with the Kathryn Spencer report,
24 Defendant Peters has denied that the Hanson report was contained in the prosecutor's file.

25 31. Plaintiffs allege that the allegations in Defendant Krause's police reports
26 detailing sexual abuse consisting of penile penetration are fabricated. Plaintiffs also allege that

any accusations against Mr. Spencer were the product of coercion and manipulation placed upon the child witnesses. Defendant Krause has never been subjected to examination regarding these matters.

32. Furthermore, it is reasonable to believe that, as Defendant Krause's supervisor, Defendant Davidson knew that the aforementioned medical examinations took place and that the results were exculpatory to Mr. Spencer. Based on the lack of evidence corroborative of the allegations, Defendant Davidson knew or should have known that the allegations against Mr. Spencer were false.

33. Defendant Davidson has denied that he knew about the Hanson medical report. However, the court in Mr. Spencer's habeas proceedings found Defendant Davidson to not be credible on this point:

Based on everything I've read in this file, I am afraid that I've come to the conclusion that Mr. Davidson, formerly of the Clark County Sheriff's Office...he's just not very credible, and I don't particularly believe what he has told us....I think that the sheriff's office was aware that Matthew Hanson had been to a doctor for this exam. *Zellner Affidavit*, at Ex. 11, p. 522-23 (*District Court's Ruling*)

Plaintiffs should be allowed to depose Defendant Davidson with regard to these issues.

Plaintiffs should be given an opportunity to depose Defendants Peters, Krause and Davidson due to inconsistent statements regarding the failure of the prosecution to disclose exculpatory medical reports of Kathryn Spencer and Matthew Hansen

34. In her sworn deposition testimony in the habeas proceedings, when asked if she knew whether or not the Kathryn Spencer medical report was forwarded to the prosecutor's office, Defendant Krause testified:

"Like I explained, I'm told it wasn't in their file. If they have all the other reports, I can't imagine them not having this one. Also, based on Jim Peters and knowing him and knowing how meticulous he is and knowing historically what I would do, there is no doubt in my mind if they didn't have a copy, he was aware of it when I got it. We talked.

1 If CAIC – If I have a prosecutor on a case, he may not have the whole case
 2 file or I may still have some reports I haven't shipped up to him, but there
 3 would be no doubt in my – 99 percent sure that he had this information. I
 4 can't imagine him not having the report if he had all the rest of the
 reports.” *Zellner Affidavit*, at Ex. 6, p. 27-28 (*Krause Habeas Deposition*).

5 35. One possible explanation for the failure of the medical reports to end up in the
 6 file is that the Clark County prosecutor's office apparently had a practice of advising the
 7 Sheriff's Office to not send reports if the prosecutor's office did not feel the report contained
 8 “significant” information. Defendant Davidson testified during Mr. Spencer's habeas
 9 proceedings as follows:

10 Q: You [sic] think it would be proper for the sheriff's department not to
 forward this report to the prosecutor?

11 A: The only way that I can see us not forwarding this to the prosecutor
 12 would be if the prosecutor didn't feel it was material of if the investigator
 felt that there was nothing of significance to the prosecutor.

13 Q: How would the prosecutor know whether it was material or not
 14 unless they saw the report?

15 A: Conversation with the investigator.

16 Q: In your experience with the Clark County Sheriff's Office, have there
 17 been situations where you have had discussions with the deputy prosecutor
 about a report, and the prosecutor has indicated that you don't need to
 forward that report to them?

18 A: I certainly can't off the top of my head, although I can think of certain
 19 instances where I've done specific things like that. *An examination on things*
 20 *that bore out no significant information, they didn't want to see the report.*
 (Emphasis added). *Zellner Affidavit*, at Ex. 8, p. 22 (*Davidson Habeas*
Deposition).

21 36. It is reasonable to believe that, as a supervisor, Defendant Davidson would be
 22 involved in the dissemination of reports to the prosecutor's office. Since the prosecution is
 23

1 claiming the reports were never received, Plaintiff should be allowed to conduct discovery as to
2 this issue.

3 37. Defendant Peters has attempted to blame the Defendant Detectives for the
4 failure to disclose these medical reports to Mr. Spencer. Conversely, the Defendant Detectives
5 have attempted to blame Defendant Peters for the failure to disclose the reports. Plaintiffs
6 should be given the opportunity to depose all Defendants and conduct discovery related to the
7 failure to disclose the exculpatory evidence.

8 ***Facts Plaintiffs will obtain by conducting discovery***

9 38. Plaintiffs reasonably and in good faith believe the following facts will be
10 obtained if this Court permits discovery to proceed:

11 a. Defendant Krause coerced and manipulated Kathryn Spencer, Matthew
12 Spencer and Matthew Hanson into making false statements against Mr. Spencer.

13 b. Defendant Krause concealed the fact that she had coerced and manipulated
14 Kathryn Spencer, Matthew Spencer and Matthew Hanson into making false
15 statements against Mr. Spencer from the prosecution.

16 c. Defendant Davidson was aware of and complicit in Defendant Krause's
17 fabrication of statements from Kathryn Spencer, Matthew Spencer and Matthew
18 Hanson.

19 d. Defendant Davidson was aware of and took part in a conspiracy to frame Mr.
20 Spencer for acts of abuse at the Salmon Creek Motel against Matthew Hanson,
21 knowing no such acts took place.

22 e. Defendant Davidson was aware that the medical reports of Kathryn Spencer
23 and Matthew Hanson did not corroborate their putative allegations of abuse.

f. Defendant Davidson either failed to provide the exculpatory medical
examinations to Defendant Peters and/or the prosecutor's office, or acted in
concert with Defendant Peters to conceal the exculpatory medical examinations.

g. Defendant Davidson conspired with the other named Defendants to conceal
an exculpatory videotape of an interview with Kathryn Spencer that was
inconsistent with her previously reported claims of abuse.

h. Defendant Davidson conspired with the other named Defendants to withhold exculpatory evidence and continue the prosecution against Mr. Spencer up until the date the charges were dropped against Mr. Spencer, in part due to the nature of his relationship with Shirley Spencer.

i. Defendant Davidson met with Defendants Peters and Krause on multiple occasions to discuss coercive interview techniques and the most effective ways of procuring incriminating statements from the children.

j. Defendant Davidson failed to properly disclose his romantic relationship with Shirley Spencer during the investigation of Mr. Spencer.

k. Defendant Davidson conspired to conveyed information regarding allegations of sexual abuse to the prosecution he knew or should have known to be false.

l. Defendant Davidson, acting alone and/or in concert with the other named Defendants, mislead the prosecution of Mr. Spencer by providing false information to the prosecution and by omitting exculpatory evidence to for the purpose of fabricating probable cause.

m. Defendant Davidson knew that apart from the coerced, false statements attributed to Matthew Spencer, Matthew Hanson and Kathryn Spencer there was no evidence of any sexual abuse by Mr. Spencer.

n. In the above-described manner, Defendants Peters, Krause and Davidson alone and in concert misled the prosecuting attorney into filing charges against Mr. Spencer.

o. Defendant Davidson approached Mr. Spencer while he was held at the county jail, and attempted to coerce Mr. Spencer into pleading guilty even after Mr. Spencer had invoked his right to an attorney.

Zellner Affidavit, ¶15.

The facts obtained through the course of discovery will defeat Defendant Davidson's motion for summary judgment¹

39. The facts obtained through discovery will defeat Defendant Davidson's motion for summary judgment.

¹ Plaintiffs do not fully brief the bases for summary judgment based primarily on procedural, rather than substantive, grounds. Plaintiffs will respectfully request an opportunity to fully respond to all bases for summary judgment once the instant motion is ruled upon and, if granted, the requested discovery is completed.

A. Plaintiff's state law claims are timely

40. Plaintiff Spencer's state law cause of action for malicious prosecution is timely. A cause of action accrues and the statute of limitations begins to run when a party has the right to apply to a court for relief. *Gazija v. Nicholas Jerns Co.*, 86 Wash.2d 215, 219 (1975); *O'Neil v. Estate of Murtha*, 89 Wash. App. 67, 69-70. An action for malicious prosecution requires a plaintiff prove, *inter alia*, the maliciously instituted proceedings ended on the merits in favor of the plaintiff or were abandoned. *Hanson v. Estell*, 100 Wash. App. 281, 286 (2000). Thus, a claim for malicious prosecution does not accrue until the proceedings terminate in a plaintiff's favor. Here, since the proceedings did not terminate in Mr. Spencer's favor until August 12, 2010, the claim is timely filed.

41. Plaintiff Spencer's state law cause of action for intentional infliction of emotional distress is timely. Under the discovery rule, a claim only accrues after the plaintiff knows or has reason to know the factual basis for each element of his claim. As in *Spring v. Brown*, 2007 WL 26766 (E.D. Wash. Jan 3, 2007) (Van Sickle, J.), Plaintiff Spencer's IIED claim "encompasses all of the Defendants' actions up until his acquittal. Accordingly, the Plaintiff did not have the factual basis for his outrage claim until his acquittal." *Id.* at *4. The facts stated above (a – o) demonstrate that Defendants committed acts throughout Mr. Spencer's incarceration and up until the proceedings terminated in his favor, including the fabrication of evidence and concealment of exculpatory evidence, to intentionally inflict emotional distress upon Mr. Spencer.

42. Plaintiff's state law cause of action for conspiracy is timely. The conspiracy to deprive Mr. Spencer of his constitutional rights, as summarized above (facts a - o) continued up through Mr. Spencer's *Alford* plea, and until the proceedings terminated in his favor.

43. Plaintiff's defamation cause of action is timely. Plaintiff's defamation claim is based on the August 12, 2010 press release. Because Plaintiff's claim was brought within 2 years of the press release, the defamation claim is timely.

B. There is evidence that Defendant Davidson took part in the investigation that led to the defamatory press release

44. Defendant Davidson claims that he took no part in defaming Mr. Spencer. However, it is quite evident that Defendant Davidson actively took part in the fabrication and concealment of evidence that resulted in the charges being filed against Mr. Spencer. Defendant Davidson thus was an active participant in the investigation upon which the defamatory statements were based.

45. Defendant Davidson's claim that he took no part in the press release is based on his own self-serving statements. Plaintiffs should be allowed to depose the defendants, as the extent of Defendant Davidson's involvement (or lack thereof) is exclusively within Defendant Davidson's control and not otherwise amenable to discovery. See *Metabolife*, 264 F.3d at 846-47 (holding that when the facts that will defeat a defendant's motion for summary judgment are within that defendant's exclusive control, a plaintiff should be allowed to depose that defendant prior to responding to a motion for summary judgment).

C. Plaintiff is not collaterally estopped from litigating claims that Defendants violated his constitutional rights

46. Defendant Davidson relies on the prior habeas proceedings to argue that Plaintiff's claims are barred by collateral estoppel. The facts to be obtained through discovery (facts a – o) will defeat this argument. Defendant Davidson's argument is easily dismissed, as none of the prior proceedings assessed the cumulative effect of *all* of the undisclosed evidence, including: (1) the sexual relationship between Defendant Shirley Spencer and Defendant

Davidson; (2) the medical reports of Kathryn Spencer and Matthew Hanson; (3) the videotaped interrogation of Kathryn Spencer by Defendant Peters; (4) Defendant Peters' notes of that interrogation; and (5) the fact that Kathryn Spencer, Matthew Spencer and Matthew Hanson were coerced and manipulated into making false statements in furtherance of a conspiracy to frame Mr. Spencer. Thus, there is no prior proceeding in which the identical issue was considered and collateral estoppel does not apply. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wash.2d 299, 307-08 (2004).

47. To the extent Defendant Davidson relies on Mr. Spencer's *Alford* plea as establishing probable cause, case law holds that a prior conviction does not establish probable cause where the conviction resulted in an *Alford* plea. *Clark v. Baines*, 150 Wash.2d 905, 912-13 (2004). "Therefore, we hold a defendant who pleads guilty to an *Alford* plea has not had a full and fair opportunity to litigate the issues in the criminal action. As such an *Alford* plea as a matter of law fails the fourth element of the four-part collateral estoppel test because giving such a plea preclusive effect in a subsequent civil action would work an injustice against the party who entered the plea." *Id.* at 917.

D1. and D2. Defendant Davidson is not entitled to qualified immunity based on probable cause

48. In determining the viability of a qualified immunity defense at the summary judgment stage the court must examine whether the facts, taken in the light most favorable to the Plaintiff, show (1) the officer's conduct would violate a constitutional right if the allegations are established and (2) whether this right was clearly established at the time of the constitutional violation. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). In analyzing whether the second prong has been satisfied courts have looked to the objective reasonableness of the official's actions. *Anderson v. Creighton*, 483 U.S. 635, 638-39 (1987). To be clearly

1 established, a right must be sufficiently clear so that every reasonable official would have
 2 understood that what he is doing violates that right. *Reichle v. Howards*, 2012 WL 1969351,
 3 *4 (2012). If the plaintiff meets this burden, then the defendant must prove that his conduct
 4 was “reasonable even though it might have violated the law.” *Trevino v. Gates*, 99 F.3d 911,
 5 917 (9th Cir. 2006)

6 49. At the outset, it should be noted there is a “clearly established” due process right
 7 not to be subjected to criminal charges on the basis of deliberately fabricated false evidence.
 8 *Atkins v. County of Riverside*, 151 Fed.Appx. 501, 505-06 (9th Cir. 2005). Moreover, it is
 9 axiomatic that probable cause cannot be based on evidence a defendant knows to be fabricated.
 10 *Id.*

11 50. The facts to be obtained from discovery as summarized above (a – o)
 12 demonstrate that Defendant Davidson is not entitled to qualified immunity based upon probable
 13 cause.² In summary, Defendant Davidson both (1) continued the investigation although he
 14 knew or should have known of the suspect’s innocence, and (2) used and/or ratified
 15 investigative techniques that were so coercive and abusive that he knew or should have known
 16 that those techniques would yield false information. *Devereaux v. Abbey*, 263 F.3d 1070,
 17 1974-76 (9th Cir. 2001).

18 51. Defendant Davidson was instrumental in fabricating statements against Mr.
 19 Spencer by encouraging the coercive techniques used against Kathryn Spencer, Matthew
 20 Spencer and Matthew Hanson. Apart from these fabricated statements there was absolutely no
 21 evidence upon which a determination of probable cause could be made. Defendant Davidson
 22

23 ² It is worth reiterating that Plaintiffs dispute several of the so-called “facts” cited in Defendant Krause’s motion upon which her claim of probable cause is based, and will respectfully request to respond fully to her motion once the instant motion has been ruled upon and, if granted, the requested discovery is completed.

1 thus either knew or should have known of Mr. Spencer's innocence, and/or that the techniques
2 that were used to interview Kathryn Spencer, Matthew Spencer and Matthew Hanson would
3 yield false information.

4 52. Furthermore, the exculpatory video and medical reports also demonstrate a lack
5 of probable cause. *Id.*, citing *Bigford v. Taylor*, 834 F.2d 1213, 1218 (5th Cir. 1988) (holding
6 that police may not disregard facts tending to dissipate probable cause). Given their alleged
7 reports of severe penetration, Defendant Davidson had to know the allegations made by
8 Kathryn Spencer and Matthew Hanson were false based on the medical examinations.
9 Defendant Davidson either failed to disclose these reports to the prosecution, and/or acted in
10 concert with Defendants Krause and Peters to remove the reports from the prosecutor's file.

11 53. Defendant Davidson's conduct does not evince a mistake in judgment; rather,
12 her acts demonstrate specific intent to frame Mr. Spencer without probable cause. Defendant
13 Davidson misled the prosecution by fabricating evidence upon which the charges were based,
14 and by withholding exculpatory evidence. As such, his conduct is not entitled to qualified
15 immunity.

16 **D3. The issue of qualified immunity for the concealment of**
17 **exculpatory information has not been previously decided, defeating**
18 **Defendant Davidson's motion for summary judgment**

19 54. Defendant Davidson's claim that the ruling on the prior habeas proceeding
20 entitles her to qualified immunity should be rejected, as the issue of qualified immunity was not
21 before the court. Furthermore, during the prior proceedings the true breadth of the material
22 concealed from Mr. Spencer was unknown, as Defendants continued to conceal evidence from
23 Mr. Spencer. No prior court has ruled on the impact of *all* of the undisclosed evidence. *See*
Argument B, supra. Moreover, the sworn statements of Kathryn Spencer and Matthew Spencer

1 that Mr. Spencer had not perpetrated any abuse were also not considered. Collateral estoppel
2 thus does not apply.

3 **E. The facts obtained through discovery will defeat Defendant Davidson's**
4 **assertion that there is no evidence of a conspiracy**

5 55. Defendant Davidson's asserts that there is no evidence of an agreement with
6 other Defendants to violate Mr. Spencer's constitutional rights. The facts described above
7 (facts a – o) defeat Defendant Davidson's argument, in that Defendant Davidson conspired with
8 Defendants Peters and Krause to frame Mr. Spencer for sexual abuse and to withhold
9 exculpatory evidence. *Mendocino Envtl. Ctr. V. Mendocino County*, 192 F.3d 1283, 1301 (9th
10 Cir. 1999) (holding that a showing that defendants committed acts that "are unlikely to have
11 been undertaken without an agreement" may support the inference of conspiracy).

12 **F. Defendant Davidson did proximately cause the alleged damage**

13 56. The facts described above (facts a – o) defeat Defendant Davidson's argument
14 that he did not proximately cause damage to Plaintiffs. Defendant Davidson's argument is
15 based on his own self-serving assertion as to the extent of his involvement in the investigation.
16 However, the facts sought in discovery will demonstrate that Davidson actively participated in
17 fabricating evidence by sanctioning coercive and manipulative interview techniques; coercing
18 Mr. Spencer to enter an *Alford* plea to crimes he did not commit; and participating in the
19 concealment of exculpatory evidence. Defendant Davidson knew (or should have known) the
20 allegations were false due not only to the implausibility of the statements, but also because the
21 irrefutable medical evidence proved that it did not happen.

22 In summary, the facts to be obtained will show Defendant Davidson participated in the
23 fabrication of evidence, withheld exculpatory evidence and misled the prosecution. He
therefore proximately caused damage to Plaintiffs.

Conclusion

Plaintiffs respectfully request that depositions of Defendants take place prior to responding to Defendant Davidson and Defendant Shirley Spencer's motion for summary judgment. Plaintiffs have not had a meaningful opportunity to conduct discovery, particularly related to Defendant Davidson's assertion of qualified immunity and causation. Defendant Davidson bases his assertion of probable cause on Defendant Krause's interviews with the children. When the facts that will defeat a defendant's motion for summary judgment are within that defendant's exclusive control, a plaintiff should be allowed to depose that defendant prior to responding to a motion for summary judgment. *Metabolife*, 264 F.3d at 846-47.

Furthermore, probable cause is a fact-intensive inquiry. *Illinois v. Gates*, 462 U.S. 213, 232 (1983) (holding that probable cause is a fluid concept turning on the assessment of probabilities in particular factual contexts, and not readily, or even usefully, reduced to a neat set of legal rules). Defendant Davidson's claim that probable cause existed is based largely on disputed facts contained in the Defendants' declarations and police reports. As such, Plaintiffs should be afforded an opportunity to depose the Defendants regarding the facts and circumstances of the investigation prior to responding to their motions for summary judgment.

The facts to be obtained through discovery will defeat Defendant Davidson's motion for summary judgment. The instant motion should thus be granted.

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1 WHEREFORE, Plaintiffs respectfully request relief under Rule 56(d), specifically that
2 Defendant Davidson's motion be denied without prejudice so that Plaintiffs can engage in
3 discovery prior to responding to Defendant Davidson's pending dispositive motion, or any
4 other relief deemed appropriate.

5 DATED this 18th day of June, 2012.

6 Davis Wright Tremaine LLP
7 Attorneys for Plaintiffs

8 By s/ Daniel T. Davies

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CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I hereby certify that on June 18, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of said filing to the following:

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The following will not receive electronic notification of the filing:

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I certify that June 18, 2012, I caused a true and correct copy of the foregoing to be mailed to Robert McKenna at the above address.

1 DATED this 18th day of June, 2012.

2 s/ Daniel T. Davies

3 Daniel T. Davies